

EXHIBIT 60

1
2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----x
5 SECURITIES INVESTOR PROTECTION
6 CORPORATION,

7 Plaintiff-Applicant,
8 -against- Adv. Pro. No.
9 08-01789 (SMB)

10 BERNARD L. MADOFF INVESTMENT
11 SECURITIES LLC,
12 Defendant.

13 -----x
14 In re:

15 BERNARD L. MADOFF,
16 Debtor.

17 -----x
18 IRVING H. PICARD, Trustee for the
19 Liquidation of Bernard L. Madoff
20 Investment Securities LLC,
21 Plaintiff,

22 -against- Adv. Pro. No.
23 10-05421 (SMB)

24 FRANK J. AVELLINO, et al.,
25 Defendants.

-----x
26
27 REMOTE VIDEOTAPED DEPOSITION OF
28 STANLEY FORTGANG
29 New Rochelle, New York
30 December 10, 2020

31 Reported By:
32 ERIC J. FINZ

December 10, 2020

10:19 a.m.

Remote Videotaped Deposition of
STANLEY FORTGANG, taken by Plaintiff,
pursuant to Notice, before ERIC J. FINZ,
a Shorthand Reporter and Notary Public
within and for the State of New York.

1
2 A P P E A R A N C E S: (All Via Remote)

3 BAKER HOSTETLER LLP

Attorneys for Plaintiffs

4 45 Rockefeller Plaza

New York, New York 10111

5
6 BY: ESTERINA GIULIANI, ESQ.

egiuliani@bakerlaw.com

KATHRYN M. ZUNNO-FREANEY, ESQ.

7 kzunno@bakerlaw.com

CHRISTINA GOTSIS, ESQ.

8 cgotsis@bakerlaw.com

9
10 HAILE SHAW & PFAFFENBERGER PA

Attorneys for Defendant

11 660 US Highway 1

North Palm Beach, Florida 33408

12
13 BY: GARY WOODFIELD, ESQ.

gwoodfield@haileshaw.com

14
15
16 ALSO PRESENT:

17 THOMAS AVELLINO

18 VINCENT MAGGIANO, Veritext Concierge

19 LEE BOWRY, Videographer

1 STANLEY FORTGANG

2 Q. Okay. And so what is the
3 basis for your opinion that the trades
4 confirmed to Avellino are legitimate
5 transactions of actual securities?

6 A. As a -- as a market-maker and
7 a practitioner for the last 25 -- for 25
8 years, it is custom and practice and
9 standard knowledge that the way a
10 transaction is confirmed is through the
11 existence of a confirmation and a
12 statement. When one receives a
13 confirmation and/or a statement, they
14 are, therefore, the recipient of the
15 transaction that's listed there. That is
16 a statement -- a confirmation reflects,
17 by definition, and market custom and
18 practice, that it is reflecting an actual
19 trade.

20 Q. And what, if any, analysis did
21 you do to determine if the trades
22 confirmed to Avellino were legitimate
23 transactions of actual securities?

24 A. I'm not sure what you mean by
25 "analysis."

1 STANLEY FORTGANG

2 Q. Well, other than your
3 experience that you just explained, did
4 you do any type of analysis on --

5 A. Sorry.

6 Q. Go ahead.

7 A. There is no analysis to be
8 done. If you receive a confirmation,
9 then a trade was done.

10 Q. Okay. And did you do any
11 analysis to determine if the trades
12 reflected on the Avellino account
13 statements actually occurred?

14 A. Same idea. An account
15 statement is just a period in time
16 summary, for a month, for a quarter or a
17 year, summary of all the confirmations
18 that were sent out, all the trades that
19 were done. So if they're listed on a
20 statement, then a trade occurred.

21 Q. Okay. And did you take any
22 steps to determine if any of those trades
23 actually were executed in the market?

24 A. They were executed between the
25 market-maker, BLMIS, and the accounts

1 STANLEY FORTGANG

2 that BLMIS did the transaction with.

3 That's the transaction.

4 Q. Well, I mean, when you say
5 that, you mean -- let me back up. What
6 do you mean by that?

7 A. When a -- when one receives a
8 confirmation, let's just say, for
9 example, when Frank Avellino receives a
10 confirmation, that a trade occurred where
11 BLMIS, let's just say, for example, sold
12 them security XYZ, then that is proof of
13 the transaction between BLMIS and the
14 Avellinos. That is the transaction that
15 occurred. What BLMIS did other than that
16 has nothing to do with Mr. Avellino.

17 Q. Did you do any analysis to see
18 what BLMIS actually did?

19 A. We know what they did. They
20 sold or bought a security with Avellino,
21 as shown by the confirmation.

22 Q. So the confirmation then is
23 what you looked at to determine that it
24 was a legitimate transaction?

25 A. The confirmation is the proof

1 STANLEY FORTGANG

2 and the only proof that exists that a
3 trade occurred between BLMIS and
4 Avellino.

5 Q. Okay. And do you know whether
6 BLMIS actually sold or bought the
7 security?

8 A. They actually bought or sold
9 it by the fact that they issued a
10 confirmation saying they bought or sold a
11 security with Mr. Avellino or the entity.

12 Q. Okay. So other than the
13 confirmation, is there anything else that
14 you would have -- that you would have --

15 A. That is the only proof that
16 exists.

17 Q. So if you received a
18 confirmation, could you go out in the
19 market and see if that trade was actually
20 done?

21 A. It was done. The market-maker
22 sold it to you. They're acting as a --
23 BLMIS is acting as a market-maker. When
24 the market-maker sells or buys to the
25 client, that is a transaction. It

1 STANLEY FORTGANG

2 A. It is the -- these documents
3 here specifically relating to opinion 1
4 and the confirms, my opinion is it does
5 not rely upon the statements and
6 confirmations. They just serve as
7 examples to me of what was received by
8 Avellino to ensure that the statements
9 and confirmations did in fact reflect
10 securities, prices, volumes, et cetera.
11 The existence of such confirmations and
12 statements are the basis of my opinion.

13 Q. Okay. And other than those
14 statement and confirmations that you have
15 been referring to, which I believe is
16 number 6 of the materials reviewed.
17 Correct? Is there anything else on this
18 list?

19 A. Sorry, I just lost it. Let me
20 go back.

21 Q. That's okay. Let me rephrase
22 the question anyway to make it clearer.

23 Other than the statement and
24 confirmations of Strattham, which is
25 number 6 in Exhibit 3, your materials

1 STANLEY FORTGANG

2 Correct?

3 A. I said yes. Yes.

4 Q. Oh, okay. I think you cut out
5 on the video, so I apologize for that.

6 A. I'm looking down at my paper.

7 Q. So did you engage in any
8 analysis of the transactions you saw in
9 the statements or confirmations?

10 A. I don't know what you mean by
11 "analysis." There was no analysis that I
12 could think of that was required. Again,
13 my opinion is based -- is that the
14 receipt or the issuance of a confirmation
15 and a statement is the proof of the
16 opinion I'm giving that a trade existed
17 between BLMIS and Avellino on an actual
18 security.

19 Q. Okay. So for example, you
20 wouldn't have checked to see if that
21 transaction that was reflected in a
22 confirmation or a statement was even
23 possible that day in the market?

24 A. No. But that wouldn't matter.
25 Between a market-maker, if the

1 STANLEY FORTGANG

2 second side to the trade. As a
3 market-maker they do the trade with you,
4 period, full stop, no other parties
5 involved.

6 Q. Okay. So for any given
7 transaction, did you do any analysis to
8 determine whether BLMIS was acting as a
9 market-maker in connection with the
10 Avellino accounts?

11 A. I'm not sure what you mean by
12 "analysis" again. But the confirmation
13 is the proof. There is no further
14 analysis.

15 Q. So when you look at a
16 confirmation, are you able to determine
17 whether or not BLMIS was acting as a
18 market-maker for that transaction?

19 A. Confirmations, I don't recall
20 offhand if they specify. Sometimes
21 confirmations do, sometimes they don't.
22 It depends who's issuing the
23 confirmation. I don't recall offhand if
24 the ones I looked at had a specific
25 denoting of what capacity they acted in.

1 STANLEY FORTGANG

2 and that allowed them to trade -- to be
3 in business.

4 Q. And where did you get those
5 facts from?

6 A. I don't recall if I did work
7 to look at it or not, or it was known to
8 me and any other market participant that
9 BLMIS was in fact a member of SEC and
10 FINRA.

11 Q. Okay. And do you know what
12 time period he was a member and what time
13 period he was registered?

14 A. I don't recall specifically.
15 But 1993 to 2008 is when I would -- I
16 shouldn't speculate, but that's when I
17 believe the time frame probably was.

18 Q. Okay. And so just to confirm,
19 so -- but you didn't do any analysis to
20 determine in which capacity BLMIS was
21 acting with the Avellino account
22 statements, that is, a broker-dealer or
23 market-maker?

24 A. They had to be acting as one
25 of those two.

1 STANLEY FORTGANG

2 Q. Okay.

3 A. Or both. So there was no
4 analysis to be done. They had to be
5 acting in one of those two, if not both,
6 capacities.

7 Q. Right.

8 But you didn't do any analysis
9 to figure out for which transaction BLMIS
10 was acting in which capacity? I'm sorry,
11 Mr. Fortgang, your video cut out because
12 I can't hear you.

13 A. Can you hear me now?

14 Q. I can hear you now.

15 A. Yeah, I don't know what
16 happened, I'm sorry.

17 I said no, I did not do any
18 further analysis.

19 Q. Okay, thank you.

20 I would like to turn your
21 attention now, Mr. Fortgang, to page 6,
22 the second full paragraph. I'm sorry,
23 page 6 of Trustee 133, your June 5th
24 report. The second full paragraph starts
25 with, "Any and all monies deposited by

1 STANLEY FORTGANG

2 the record, the time is 2:06 p.m.

3 This is the end of media unit 3.

4 (A recess was taken.)

5 THE VIDEOGRAPHER: We're back

6 on the record, the time is

7 p.m. This is the beginning of

8 media unit 4 in the deposition of

9 Stanley Fortgang.

10 BY MS. GIULIANI:

11 Q. Hello again, Mr. Fortgang.

12 A. Hi.

13 Q. So I would like to direct your
14 attention to opinion 3, which is page 7
15 of your June 5th report.

16 A. Okay.

17 Q. Okay. Where it says, "A
18 market-maker selling naked shorts is
19 common and acceptable practice."

20 Do you see that?

21 A. Yes.

22 Q. So on page 7, the third
23 paragraph under opinion 3 states,
24 "Therefore, when BLMIS, acting as a
25 market-maker, sold securities to Avellino

1 STANLEY FORTGANG

2 that it may not have owned, it was acting
3 in a perfectly legitimate manner."

4 Do you see that?

5 A. Yes.

6 Q. Okay. What do you mean by
7 BLMIS sold securities to Avellino that it
8 may not have owned?

9 A. So that's what short selling
10 is, when you sell something you do not
11 yet own. And as a market-maker, they had
12 an exemption from Reg SHO, which allowed
13 them to naked short any securities that
14 they wanted to. So if they sold
15 securities to Avellino that they did not
16 have, they were engaging in short selling
17 that they were permitted to do.

18 Q. Okay. And just to be clear,
19 when you say Avellino, again, we're
20 referring to Frank Avellino, the related
21 family entities, and family members that
22 are defendants. Correct?

23 A. Correct.

24 Q. Okay. And now what specific
25 securities did BLMIS sell to Avellino

1 STANLEY FORTGANG

2 that it may not have owned?

3 A. Oh, I do not know that.

4 Q. Okay. So you did no analysis
5 to determine what specific securities
6 BLMIS sold to Avellino that it may not
7 have owned?

8 A. There is no way for anyone to
9 know that.

10 Q. What do you mean?

11 A. There is no way for anyone to
12 know that. BLMIS is selling a security,
13 only they know if they had it or they
14 didn't. No one else in the marketplace
15 would know if they had it.

16 Q. Okay. So would there be no
17 record that BLMIS sold a security
18 eventually?

19 A. We have records. I'm not sure
20 what you mean by "eventually." But the
21 record of the sale was the confirmation
22 issued from BLMIS to Avellino or
23 whomever. They issue a confirmation to
24 show, to memorialize the fact that they
25 sold these securities to them.

1 STANLEY FORTGANG

2 Q. Okay. So is it your testimony
3 then that -- well, let me ask this
4 question: So do you know what specific
5 securities BLMIS sold to Avellino that it
6 did not own?

7 A. You, I believe, asked and
8 answered is what you guys like to say. I
9 believe you asked me that already. And
10 there is no way to know that.

11 Q. Okay.

12 A. There is absolutely no way you
13 could know that.

14 Q. Okay. The question I'd asked
15 you was about may not have owned, now I
16 was honing in on whether it did not own
17 it. So you have the same answer, in
18 other words, you're saying that there is
19 no way to know that?

20 A. Correct.

21 Q. BLMIS would know that, but
22 there is no way --

23 A. Correct.

24 Q. Okay. And I assume that would
25 mean it would be in BLMIS's records,

1 STANLEY FORTGANG

2 whether or not --

3 A. If you could see their
4 holdings on a given day when they did a
5 transaction, then yes.

6 Q. Okay. So what is the basis
7 for your statement that BLMIS sold
8 securities to defendants that it may not
9 have owned?

10 A. Well, they sold securities to
11 the defendant, because we have the
12 confirmations and the statements. We
13 don't know if they owned them or not, so
14 we say may have been. They may have
15 owned them, but since we can't know that,
16 we have to know that they either did or
17 didn't. So they may have been selling
18 something they didn't own. But that's
19 perfectly legitimate. So if one were to
20 say but they sold you these but they
21 didn't have them, I am saying that makes
22 no difference whatsoever.

23 Q. And so the securities that
24 you're talking about that were sold to
25 Avellino, what securities are you talking

1 STANLEY FORTGANG

2 about? Are you talking about all the
3 securities that are reflected on their
4 BLMIS statements?

5 A. Anything that BLMIS issued a
6 statement -- issued a confirmation that
7 they sold to Avellino, would be included.
8 The confirmation says we sold it to you.

9 Q. Okay. And so this statement
10 that BLMIS sold securities to Avellino
11 that it may not have owned, is that based
12 on your -- is based on what?

13 A. It says may. It didn't say
14 they did. There is no basis for a may.
15 It's saying that it is -- all I'm saying
16 is that if one were to say, but how could
17 they have sold securities that they
18 didn't own, this is to say, that is the
19 course of business that one can and in
20 fact often does, or it may have, sold
21 securities it does not own. And that is
22 perfectly legitimate, it is still a
23 full-fledged transaction of an actual
24 security.

25 Q. Okay. So you mentioned naked

1 STANLEY FORTGANG

2 short sales before. Did you do any
3 analysis to confirm whether BLMIS engaged
4 in naked short selling in connection with
5 the Avellino accounts?

6 A. That would be the same answer
7 as short selling, which is there is
8 absolutely no way one could possibly know
9 that, other than BLMIS, at the time that
10 they sold the securities.

11 Q. Okay. But you didn't -- but
12 you didn't do any analysis to determine
13 that?

14 A. I could have tried to do all
15 the analyses in the world, it would have
16 been a wonderful billing experience, but
17 there is nothing you could possibly find.
18 It doesn't exist.

19 Q. When you say doesn't exist,
20 you mean it doesn't exist anywhere, not
21 in BLMIS records or anywhere?

22 A. Again, it would be -- it might
23 be in a BLMIS record from the time, a
24 contemporaneous analysis of on this and
25 this day at this and this time when they

1 STANLEY FORTGANG

2 sold these securities, that they sold
3 them short and naked short. I don't even
4 know if they would have that in their
5 records that it was a naked short. It's
6 not normally kept anywhere. It's not
7 recorded anywhere.

8 Q. Okay. And so sitting here
9 today, can you point to any specific
10 transaction for the Avellinos when BLMIS
11 was acting as a market-maker and sold a
12 security to Avellino that it may not have
13 owned?

14 A. There is, again, there is --
15 it's impossible for me or anyone else to
16 know that. So the answer is no, I cannot
17 point to a specific transaction that they
18 may have executed short. Because there
19 is no one in the universe who knows that,
20 except BLMIS at that time.

21 Q. Okay. And are you aware of
22 any specific instance where BLMIS was
23 purportedly engaged in short selling in
24 connection with the Avellino accounts?

25 A. There is no way for me to know

1 STANLEY FORTGANG

2 that. Same thing.

3 Q. Okay. If I could direct you
4 to the last sentence of the fifth
5 paragraph on page 7, opinion 2. Where it
6 starts with, "It would therefore be
7 illogical to assume that at some
8 point" --

9 A. One second.

10 Q. I'm sorry.

11 A. I'm trying to find where you
12 are.

13 Q. Page 7, opinion 3.

14 A. Yes.

15 Q. Fifth paragraph, last
16 sentence.

17 A. Which paragraph?

18 Q. Fifth. It's the last sentence
19 that starts with, "It would therefore be
20 illogical."

21 A. Okay. Next paragraph. I got
22 it.

23 Q. I'm just going to read it into
24 the record. "It would therefore be
25 illogical to assume that, at some point

1 STANLEY FORTGANG

2 during any trading period, short sales
3 made to Avellino were not covered by the
4 same equity coming into the books of
5 BLMIS."

6 You see that, correct,
7 Mr. Fortgang?

8 A. Yes, I do.

9 Q. Okay. And so when you say
10 short sales made to Avellino, what short
11 sales are you referring to?

12 A. Any that may exist.

13 Q. Okay. And so is it your
14 opinion that short sales did occur in the
15 Avellino accounts?

16 A. I, again, cannot know that.
17 I'm not here to make assumptions and say
18 I assume that they were. But, what I'm
19 saying is, if these were short sales,
20 that they were legitimate transactions,
21 as short sales. If there were. If you
22 were to say, but they didn't own these
23 securities, how could they sell them, I
24 am just saying they could have been short
25 sales. And if so, they're still

1 STANLEY FORTGANG

2 perfectly legitimate transactions.

3 Q. Okay. And have you actually
4 seen any specific instances of short
5 selling in the Avellino BLMIS accounts?

6 A. Nobody in the universe could
7 see that.

8 Q. Okay. When you say nobody can
9 see that, you mean nobody except for
10 BLMIS?

11 A. BLMIS at the time of the
12 transaction, unless they kept records,
13 which no one that I know of would keep a
14 record like that.

15 Q. Okay. So going back to your
16 statement, "it would therefore be
17 illogical to assume that, at some point
18 during any trading period, short sales
19 made to Avellino were not covered by the
20 same equity coming into the books of
21 BLMIS."

22 Can you explain what you mean
23 by "covered by the same equity coming
24 into the books of BLMIS"?

25 A. This is, this is somewhat of